

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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SKY ZONE, LLC,

Plaintiff,

v.

JERRY RAYMOND, *et al.*,

Defendant.

3:11-cv-0141-LRH-WGC

ORDER

Before the Court is Plaintiff Sky Zone, LLC's ("Sky Zone") Motion for the Court to Defer Consideration of Defendants' Motion for Summary Judgment. Doc. #100.<sup>1</sup> Defendants filed an Opposition (Doc. #102), to which Sky Zone replied (Doc. #106). Thereafter, Defendants moved for leave to file a sur-reply. Doc. #109.

**I. Facts and Background**

Plaintiff Sky Zone is a Nevada limited liability company that owns United States Patent 5,624,122 ("the '122 patent"), which discloses an invention for "a resilient playing field comprised of trampoline panels adjacent to one another on a grid of steel cables." Doc. #43 at 2. The '122 patent explains that "the resilient field enables games where participants can perform jumping feats not possible on ground." *Id.* A copy of the patent, titled "Sport Game and Field" is attached as Exhibit A to the Complaint. Doc. #1, Exhibit A.

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<sup>1</sup> Refers to the Court's docket number.

1 Sky High Sports (“Sky High”) is a limited liability company that provides trampoline  
 2 centers at numerous locations throughout California, Oregon, and Washington. Doc. #34 ¶6. Prior  
 3 to opening these trampoline centers, Defendant Jerry Raymond, a managing member of Sky High  
 4 Sports, visited Sky Zone’s facility in Las Vegas and discussed franchising opportunities. *Id.* ¶7.

5 On February 25, 2011, Sky Zone filed a Complaint against Sky High for patent  
 6 infringement, alleging that Sky High’s facilities infringed claims 1 through 4 of the ‘122 patent.  
 7 Doc. #1 ¶36. In its Answer, filed on April 22, 2011, Sky High asserted six affirmative defenses to  
 8 Sky Zone’s claim of infringement: (1) failure to state facts sufficient to constitute a cause of action;  
 9 (2) estoppel; (3) waiver; (4) laches; (5) unclean hands; and (6) statute of limitations. Doc. #34 at 5.

10 Sky High also asserted three counterclaims against Sky Zone: (1) declaratory judgment of  
 11 noninfringement; (2) declaratory judgment of invalidity; and (3) tortious interference with  
 12 prospective business relations. *Id.* at 9-10. In its Answer to Sky High’s counterclaims, Sky Zone  
 13 asserted eleven affirmative defenses: (1) failure to state a claim upon which relief may be granted;  
 14 (2) unclean hands; (3) valid patent; (4) truthfulness; (5) economic interest; (6) interest as  
 15 competitor in industry; (7) failure to mitigate damages and/or losses claimed; (8) lack of causation;  
 16 (9) assumption of risk; (10) good faith; and (11) entitlement to offset. Doc. #36 at 4-5.

17 Claim 1 of the ‘122 patent, which includes the terms at issue here, describes:

18 A supported surface for transitional movement, said surface being formed of:

- 19 a. a grid of elongated steel cables disposed above a ground level, said  
 20 grid being formed of a plurality of first parallel cables spaced from  
 21 each other, and a plurality of second steel cables disposed transversely  
 22 of and in abutment with the first cables, said second steel cables being  
 23 parallel to, and spaced from, each other, said first and second cables  
 24 defining a plurality of open spaces between the cables;
- 25 b. means to support each of said cables at their respective extremities;
- 26 c. a plurality of first panels, each of said first panels being formed of a  
 yieldable heavy fabric having edges and each panel being configured to  
 space its edges from either a first or second cable defining space;
- d. a plurality of resilient elements extending outwardly from each edge of  
 each panel for attachment to the nearest of said first and second cables,  
 thereby to support the panel on said first or second cables within a  
 space defined by said cables; and
- e. a plurality of elongated cover means, the last said means each  
 comprising a padded sheet material having a width greater than the

1 distance between parallel edges of adjacently disposed panels, each  
2 said cover means being disposed over at least a portion of one of the  
3 first and second cables and the resilient means attached thereto and  
4 extending from the edge of a first panel.

5 Doc. #1, Exhibit A, '122 Patent 5:4-30.

6 Defendants filed a Motion for Summary Judgment on January 30, 2015. Doc. #99. In lieu  
7 of a response, Sky Zone requests that the Court defer consideration of Defendants' Motion so that  
8 the parties can complete discovery. Doc. #100. The parties' stipulated Scheduling Order sets June  
9 5, 2015, as the discovery cut-off date. Doc. #104 at 3.

## 10 **II. Legal Standard**

11 If a party opposing summary judgment shows that it cannot yet present essential facts to  
12 support an opposition, the court can defer consideration of the motion until the factual record  
13 becomes more complete. Fed. R. Civ. P. 56(d). Rule 56(a) permits a party to move for summary  
14 judgment any time after the expiration of twenty days from the commencement of the action.  
15 *Burlington N. Santa Fe R.R. Co. v. Assiniboine and Sioux Tribes of Fort Peck Reservation*, 323  
16 F.3d 767, 773 (9th Cir. 2003). However, courts generally grant motions to continue under Rule  
17 56(d) freely because "lightning-quick summary judgment motions can impede informed resolution  
18 of fact-specific disputes." *Id.* at 773-74. In order to succeed on a Rule 56(d) motion, a party must  
19 identify what facts are sought, and how such facts will reasonably create triable issues or otherwise  
20 rebut summary judgment. *See Moss v. U.S. Secret Serv.*, 572 F.3d 962, 965 n.3 (9th Cir. 2009)  
(quoting *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 524 (9th Cir.1989)).

## 21 **III. Discussion**

22 Sky Zone states that additional discovery "is reasonably expected to create triable issues of  
23 fact . . . on the factual analysis of alleged non-infringement under the doctrine of equivalents."  
24 Doc. #100 at 2. Specifically, Sky Zone states that it plans to complete essential discovery before  
25 June 5, 2015, including depositions and written discovery of Defendants on a wide range of issues  
26 such as trampoline field design, modifications for each Sky High trampoline, and other related

1 design efforts, and depositions of Defendants' expert witnesses. *Id.* at 4-6. Defendants argue that  
2 the Court should not allow additional discovery because: (1) no factual dispute is relevant to the  
3 summary judgment motion because it raises a pure legal issue; (2) Sky Zone was able to serve its  
4 expert report without the discovery it now claims is essential; and (3) Sky Zone has not explained  
5 why it has waited to conduct the needed discovery until this point. Doc. #102 at 3.

#### 6 **A. Purely Legal Issue**

7 Defendants state that Sky Zone has raised a purely legal issue: "whether Plaintiff is  
8 precluded as a matter of law from arguing that rigid poles are the equivalent of the claimed flexible  
9 steel cables of the asserted patent." *Id.* at 4. Defendants state further that all material facts related  
10 to their motion are undisputed, and that in order to prevail, Sky Zone must, based on these facts,  
11 "show that a specific part of Defendants' accused trampoline systems is the equivalent of a specific  
12 limitation of the '122 patent claims." *Id.* at 4-5. Defendants raise the following undisputed facts:  
13 (1) Sky Zone "did not dispute the examiner's statements during re-examination of the '122 patent  
14 that the rigid steel poles of the prior art trampoline are not the equivalent of the flexible steel cables  
15 of the claims of the '122 patent"; (2) "Defendants' trampoline system does not use flexible steel  
16 cables and instead uses rigid steel poles"; and (3) Sky Zone "is alleging infringement under the  
17 doctrine of equivalents because Defendants' rigid poles are not literally the flexible steel cables of  
18 the '122 patent." *Id.* at 5. Based on these undisputed facts, Defendants argue that "the only issue  
19 to be resolved is the purely legal issue of whether Plaintiff's actions during re-examination preclude  
20 Plaintiff from arguing infringement under the doctrine of equivalents." *Id.* at 6.

21 Sky Zone argues that it seeks discovery involving factual issues that will impact  
22 Defendants' Motion, including "what structure each Defendant facility uses, and whether or not  
23 Defendants' trampoline structures perform[] substantially the same function, in substantially the  
24 same way, to produce substantially the same result as the claimed element(s) of the '122 Patent."  
25 Doc. #106 at 3. The Court agrees that discovery of these facts could resolve factual issues related  
26 to Sky Zone's doctrine of equivalents claim. Importantly, although the majority of Defendants'

1 Motion discusses the legal effect of Sky Zone’s “acquiescence” during the reexamination process,  
2 the Motion also addresses infringement under the doctrine of equivalents. *See* Doc. #99 at 15-16.  
3 “The inquiry of ‘[i]nfringement, either literal or under the doctrine of equivalents, is a question of  
4 fact.’” *Amdocs (Isr.) Ltd. v. Openet Telecom, Inc.*, 761 F.3d 1329, 1338 (Fed. Cir. 2014) (quoting  
5 *Brilliant Instruments, Inc. v. GuideTech, LLC*, 707 F.3d 1342, 1344 (Fed. Cir. 2013)).  
6 Accordingly, the Court finds that additional discovery could aid the Court in resolving Defendants’  
7 Motion for Summary Judgment.

### 8 **B. Sky Zone’s Expert Report**

9 Defendants argue that the fact that Sky Zone was able to serve its expert report on February  
10 20, 2015, indicates that it does not, in fact, need the additional discovery now requested. Sky Zone  
11 responds that it served the expert report on February 20, 2015, in accordance with the stipulated  
12 time line in the Discovery Plan and Scheduling Order, and adds that it would supplement the expert  
13 report pursuant to Federal Rule of Civil Procedure 26(e)(2) if necessary based on discovery yielded  
14 before the June 5, 2015, discovery deadline. Although not directly at issue at this time, the Court  
15 notes that any such supplement of Sky Zone’s expert report might be improper. *See Plumley v.*  
16 *Mockett*, 836 F. Supp. 2d 1053, 1062 (C.D. Cal. 2010) (“[A] supplemental expert report that states  
17 additional opinions or seeks to strengthen or deepen opinions expressed in the original expert report  
18 is beyond the scope of proper supplementation and subject to exclusion.”). However, Sky Zone’s  
19 service of its expert report by the deadline stated in the Scheduling Order does not necessarily  
20 indicate that further discovery would be superfluous. The Court will not hold that Sky Zone’s  
21 punctual service of its expert report constituted a waiver of any right to conduct additional  
22 discovery before the discovery deadline.

### 23 **C. Delay in Discovery**

24 Finally, Defendants argue that Sky Zone has provided no reason for its failure to complete  
25 necessary discovery before now. Defendants acknowledge the delay caused by its bankruptcy case,  
26 but argue that this explanation is insufficient to justify granting additional time to complete

1 discovery. Sky Zone states that it wanted to conduct depositions after the September 30, 2014,  
2 *Markman* hearing and the Court's October 9, 2014, claim construction Order. *See* Doc. #88. Sky  
3 Zone also represents that the parties have already discussed Rule 30(b)(6) depositions, which will  
4 occur in April and May, 2015. Doc. #106 at 8. In light of fact that courts freely grant motions to  
5 defer consideration pending completion of discovery, *see Burlington N. Santa Fe R.R. Co.*, 323  
6 F.3d at 773-74, Defendants simply have not convinced the Court that Sky Zone delayed discovery  
7 in bad faith such that the Court should deny its request to complete discovery prior to responding to  
8 Defendants' Motion for Summary Judgment.

9 **D. Motion to File Sur-Reply**

10 Defendants filed a Motion to File a Sur-Reply, largely to raise concerns regarding Sky  
11 Zone's representations about its expert report. Doc. #109 at 4. Sur-replies "are highly disfavored,  
12 as they usually are a strategic effort by the nonmovant to have the last word on a matter." *Avery v.*  
13 *Barsky*, No. 3:12-cv-0652, 2013 WL 1663612, at \*2 (D. Nev. Apr. 17, 2013). Although  
14 Defendants' proposed sur-reply raises additional issues about Sky Zone's expert report in response  
15 to Sky Zone's reply, these issues do not impact the Court's determination that allowing Sky Zone to  
16 file its response after the close of discovery would not cause undue prejudice. Moreover,  
17 Defendants' proposed sur-reply largely reargues points that were already raised in Defendants'  
18 Opposition. *See* Doc. #102. The Court therefore denies Defendants' Motion to File a Sur-Reply  
19 because it would serve little purpose besides allowing Defendants to have the last word. *See id.*

20 In the alternative to granting its Motion to File a Sur-Reply, Defendants requested oral  
21 argument to resolve the issues regarding Sky Zone's expert report. Oral argument is not necessary  
22 to resolve the present Motion to Defer Consideration because the Court did not rely on the  
23 representations about Sky Zone's expert in its decision to grant Sky Zone's Motion. *See Koerner v.*  
24 *Grigas*, 238 F.3d 1039, 1048 (9th Cir. 2003) ("The district court need not consider arguments  
25 raised for the first time in a reply brief."). Accordingly, the Court denies Defendants' request for an  
26 oral argument at this time.

1 **IV. Conclusion**

2 IT IS THEREFORE ORDERED that Sky Zone's Motion to Defer Consideration (Doc.  
3 #100) is GRANTED.


4 IT IS FURTHER ORDERED that Defendants' Motion to File a Sur-Reply (Doc. #109) is  
5 DENIED.

6 IT IS FURTHER ORDERED that Sky Zone shall file its response to Defendants' Motion  
7 for Summary Judgment on or before June 19, 2015.

8 IT IS FURTHER ORDERED that Sky Zone's Motion to Seal Reply to Response to Motion,  
9 Declaration of Scott A. Schroeder (Doc. #107) is GRANTED.

10 IT IS SO ORDERED.

11 DATED this 21st day of April, 2015.

12   
13 LARRY R. HICKS  
14 UNITED STATES DISTRICT JUDGE  
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